Nolde and Arbitration of Post-Contract Disputes

In *Nolde Brothers v. Local 358, Bakery & Confectionery Workers Union*,[1] the United States Supreme Court ruled that the duty to arbitrate under a collective-bargaining agreement containing a broad and inclusive arbitration clause extends to disputes arising out of events occurring after the stated expiration date of the agreement (post-contract disputes). In so doing, the Court extended to post-contract disputes the strong presumption of arbitrability rule of contract interpretation enunciated in *United Steelworkers v. Warrior & Gulf Navigation Co.*[2] The Court, however, failed to enunciate the best reasons for its decision. The Court also failed to confront the ramifications of its extension of the strong presumption of arbitrability to post-contract disputes like the one present in *Nolde*.

This Case Comment will analyze the soundness of the Court's decision in light of the reasoning articulated by the Court and in light of the reasons that the Court failed to enunciate. It will also examine some of the unresolved issues and problems raised by the Court's decision both in the context of a continuing employment relationship and in the context of situations in which the employment relationship has been completely terminated at the time the dispute arose.

I. BACKGROUND

A. *Arbitrability in General*

At common law, executory agreements to arbitrate in collective bargaining agreements were not enforceable in the courts, absent a statute to the contrary.[3] Such agreements were considered incompetent to oust the courts of their jurisdiction.[4] In 1947, partly in response to the growth of organized labor and the increase in the number of collective-bargaining agreements, Congress passed sections 203(d)[5] and 301(a)[6] of the Labor Management Relations Act. Section 203(d) declared "[f]inal adjustments by a method agreed upon by the parties . . . to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement."[7] These

1. 430 U.S. 243 (1977).

2. 363 U.S. 574 (1960).

3. *See, e.g.*, Tatsuuma Kisen Kabushiki Kaisha v. Prescott, 4 F.2d 670 (9th Cir. 1925); Annot., 135 A.L.R. 79 (1941); Kuelthau, *Introduction to Labor Arbitration*, 12-2 PRAC. LAW. 61 (1966).

4. *See, e.g.*, Gatliff Coal Co. v. Cox, 142 F.2d 876, 881 (6th Cir. 1944).

5. Labor Management Relations Act of 1947, Pub. L. No. 101, § 203(d), 61 Stat. 154 (codified at 29 U.S.C. § 173(d) (1976)).

6. Labor Management Relations Act of 1947, Pub. L. No. 101, § 301(a), 61 Stat. 156 (codified at 29 U.S.C. § 185 (1976)).

7. Labor Management Relations Act of 1947, Pub. L. No. 101, § 203(d), 61 Stat. 154 (codified at 29 U.S.C. § 173(d) (1976)).

sections were interpreted by the United States Supreme Court as creating a national policy favoring arbitration.[8]

In implementing this national policy, the courts developed a theory of the structure of collective-bargaining agreements and the arbitration provisions contained within them to aid in the interpretation of the agreements and of the laws applicable to them. This theory includes delineations of the powers of the courts to enforce agreements to arbitrate, the rights and duties that are normally created by agreements to arbitrate, the reasons parties to collective-bargaining agreements agree to arbitrate disputes, and an enunciation of certain national policies to be considered in the interpretation of agreements to arbitrate. A discussion of the development of this theory appears below.

In *Textile Workers Union v. Lincoln Mills*[9] and *Local 174, Teamsters v. Lucas Flour Co.*,[10] the Supreme Court dealt with the courts' power to enforce arbitration agreements and with the rights and duties normally created by collective-bargaining agreements. In *Lincoln Mills*, the Court interpreted section 301(a) of the Labor Management Relations Act as giving the courts the power to specifically enforce arbitration agreements, stating that an "agreement to arbitrate grievance disputes is the *quid pro quo* for an agreement not to strike."[11] In *Lucas Flour* the Court, adopting the rationale employed by some lower courts and the National Labor Relations Board, found an implied agreement not to strike in a collective-bargaining agreement that required the employer to submit disputes to arbitration.[12] These lower court decisions provided, first, that arbitration was intended to provide a substitute for economic resolution of disputes such as strikes and lockouts.[13] Second, they stated that allowing strikes in the face of an arbitration clause would discourage the making of arbitration agreements and undercut the national policy in favor of arbitration.[14] Thus, the courts used their power to enforce arbitration agreements to establish that collective-bargaining agreements normally contained coterminous arbitration and no-strike duties.

Gateway Coal Co. v. United Mine Workers[15] reinforced the Court's decision in *Lucas Flour*. The Court in *Gateway* agreed that the duty to arbitrate and the duty not to strike remained contractual, and that the two duties remained analytically distinct.[16] But the Court nonetheless said that when the parties had agreed to arbitrate a particular dispute, the Court

8. United Steelworkers v. American Mfg. Co., 363 U.S. 564, 566-67 (1960).

9. 353 U.S. 448 (1957).

10. 369 U.S. 95 (1961).

11. 353 U.S. at 455.

12. 369 U.S. at 104-06.

13. *E.g.*, Teamsters, Local 25 v. W.L. Mead, 230 F.2d 577, 583-84 (1st Cir. 1956), *cert. dismissed*, 352 U.S. 802 (1956).

14. W.L. Mead, Inc., 113 N.L.R.B. 1040, 1043 (1955).

15. 414 U.S. 368 (1974).

16. *Id.* at 374.

would imply a duty not to strike absent an explicit expression of a contrary intent.[17]

As we have seen, *Textile Workers Union v. Lincoln Mills* gave courts the power to specifically enforce arbitration agreements against employers. The *Lincoln Mills* Court further held that the anti-injunction provisions of the 1932 Norris-LaGuardia Act,[18] which denied the federal courts jurisdiction to issue an injunction in the adjudication of labor disputes, were not directed against the courts' power to specifically enforce agreements to arbitrate.[19] Rather, according to the Court in *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, the Norris-LaGuardia Act was an attempt by Congress to prevent the federal courts from preliminarily enjoining, and through the injunction breaking, incipient strikes that the Congress perceived to be perfectly legal.[20]

In *Boys Markets* the Supreme Court extended the lower courts' power to enforce arbitration agreements by allowing them to enjoin strikes in violation of such agreements. The Court reasoned that any incentive for employers to enter into a mandatory arbitration agreement would be dissipated if the no-strike obligation could not be enforced by an injunction in addition to an action for money damages.[21] In so doing, the Court adopted language from the dissent in *Sinclair Refining Co. v. Atkinson*,[22] which set forth several preconditions for enjoining a strike. These conditions were that the strike "be over a grievance which both parties are contractually bound to arbitrate";[23] that the court, not the arbitrator, determine that the collective-bargaining agreement does have that effect;[24] that "the employer should be ordered to arbitrate, as a condition of his obtaining an injunction against the strike";[25] and that "the District Court must . . . consider whether issuance of an injunction would be warranted under ordinary principles of equity. . . ."[26]

In *Warrior & Gulf*,[27] the Supreme Court's concern was to develop a rule of contract interpretation that would ensure the full implementation of the national policy in favor of arbitration. The Court dealt in *Warrior & Gulf* with a collective-bargaining agreement that linked the duties to arbitrate and not to strike to disputes arising under, or involving the

17. *Id.* at 382.

18. 29 U.S.C. §§ 101-115 (1976).

19. 353 U.S. at 458.

20. 398 U.S. 235, 251 (1970).

21. *Id.* at 248.

22. 370 U.S. 195, 215-29 (1962) (Brennan, J., dissenting).

23. 398 U.S. at 254 (quoting Sinclair Refining Co. v. Atkinson, 370 U.S. 195, 228 (1962) (Brennan, J., dissenting)).

24. 398 U.S. at 254.

25. *Id.* (quoting Sinclair Refining Co. v. Atkinson, 370 U.S. 195, 228 (1962) (Brennan, J., dissenting)).

26. *Id.*

27. United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960).

application and interpretation of, that agreement.[23] Prior to *Warrior & Gulf*, many courts had closely examined the intent of parties to a collective-bargaining agreement to determine whether a particular dispute "arose under"[29] the contract, declining to order arbitration without extensive threshold inquiry into whether the substantive rights at issue might arguably have been created by the contract. Thus, the decision on the question of arbitrability of a dispute necessarily entailed a decision on the merits.[30]

In *Warrior & Gulf*, the Court virtually eliminated this problem of courts deciding the merits of disputes "through the back door of interpreting the arbitration clause."[31] It stated that the national policy is one favoring arbitration,[32] and accordingly created a strong presumption in favor of arbitrability that arises when the parties have included a broad and inclusive arbitration provision in the collective-bargaining agreement. The Court further stated that "[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute."[33] Finally, "[i]n the absence of any express

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28. The collective-bargaining agreement in Nolde Bros. v. Local 358, Bakery & Confectionery Workers Union, 430 U.S. 243, 245 (1977) provides an example of such an agreement. That contract read in part:

> Article XII, Grievances and Arbitration:
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> Section 1. All grievances shall be first taken up between the Plant Management and the Shop Steward. If these parties shall be unable to settle the grievance, then the Business Agent of the Union shall be called in, in an attempt to arrive at a settlement of the grievance. If these parties are unable to settle the grievance, the dispute will be settled as called for in Sections 2 and 3 of this Article.
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> Section 2. In the event that any grievance cannot be satisfactorily adjusted by the procedure outlined above, either of the parties hereto may demand arbitration and shall give written notice to the other party of its desire to arbitrate.

The agreement in International Ass'n of Machinists & Aerospace Workers v. Oxco Brush Div. of Vistron, 517 F.2d 239, 242 (6th Cir. 1975) provides another example: "Step 5—If Settlement is not reached under Step 4, the grievance may be submitted to Arbitration; providing the grievance involves the interpretation, application, or alleged violation of the specific provisions of this written Agreement."

29. The courts have utilized a test analogous to that used in resolving issues of federal question jurisdiction—that is, whether a dispute or claim arguably arises under the collective-bargaining agreement—in order to determine the arbitrability of a particular dispute or claim. For a discussion of federal question jurisdiction, see 1 MOORE'S FEDERAL PRACTICE ¶ 0.62, at 652-73 (2d ed. 1977).

30. *See* United Steelworkers v. American Mfg. Co., 264 F.2d 624 (6th Cir. 1959), *rev'd*, 363 U.S. 564 (1960).

31. 363 U.S. at 585.

32. *Id.* at 581-82. *See* Cox, *Reflections upon Labor Arbitration*, 72 HARV. L. REV. 1482, 1490-1500 (1959). Significantly, in Jones & Smith, *Management and Labor Appraisals and Criticisms of the Arbitration Process: A Report with Comments*, 62 MICH. L. REV. 1115, 1116-17 (1965), it is stated:

> By an overwhelming majority our respondents indicate that they prefer the arbitration process to the available alternatives as a method of ultimate resolution of contract application (grievance) disputes. Only some five percent of our "management" respondents (including lawyers representing management) indicate a preference for resort to the courts, or a preference for exclusive reliance on the collective bargaining process including permissive strike action. Not a single union official respondent prefers either of such methods as an alternative to arbitration.

But for a criticism of labor arbitration, see P. HAYS, LABOR ARBITRATION: A DISSENTING VIEW (1966).

33. 363 U.S. at 582-83.

provision excluding a particular grievance from arbitration," the Court required "the most forceful evidence of a purpose to exclude the claim from arbitration."[34] Thus, after *Warrior & Gulf* any dispute that is not expressly or by *clear* implication excluded by the terms of the arbitration agreement, and that arose out of events occurring during the stated life of that agreement, is clearly arbitrable.

B. *The Background of the Arbitrability of Post-Contract Disputes*

The problem of courts addressing the merits of disputes, however, was not completely eliminated by the strong presumption of arbitrability developed by the Court in *Warrior & Gulf*. In cases like *Nolde*,[35] concerning disputes arising out of events that occurred after the stated expiration of a collective-bargaining agreement, but arguably "arising under" the old agreement or requiring its interpretation and application, the courts were again tempted to decide the merits of the dispute, occasionally without even considering the question of arbitrability.

The Supreme Court has twice prior to *Nolde* been presented with the question of the arbitrability of post-contract disputes similar to the one at issue in *Nolde*. The Court did not, however, clearly resolve the question in those instances. In the first of these cases, *John Wiley & Sons v. Livingston*,[36] the Court ruled for arbitration. The main issue in *Wiley* was the obligation of successor employers, who had bought out the prior owner of a company, to arbitrate as provided in the contract that the prior owner had concluded with the union. Therefore, in its opinion the Court did not focus on arbitration of post-contract disputes. As a result, the decision in *Wiley* did not produce uniformity in the lower federal courts.[37]

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34. *Id.* at 584-85.

35. Local 358, Bakery & Confectionery Workers Union v. Nolde Bros., 382 F. Supp. 1354 (E.D. Va. 1974), *rev'd*, 530 F.2d 548 (4th Cir. 1975), *aff'd*, 430 U.S. 243 (1977). The district court determined that there was no longer an agreement in effect, and that consequently nothing remained to be arbitrated.

36. 376 U.S. 543 (1964).

37. Typically, the claimant seeks arbitration of disputes over arguably vesting rights, such as severance pay, rights to vacation pay, or seniority rights, when the severance of the employee, the date for vacation, or the promotion in violation of seniority provisions does not occur until after expiration of the collective-bargaining agreement that allegedly created the rights. The lower courts have taken four approaches to deciding these cases. Some courts have decided the merits of the dispute, determining that no rights survive termination of the contract, and that no issue, therefore, remains to be arbitrated. *E.g.*, Local 358, Bakery & Confectionery Workers Union v. Nolde Bros., 382 F. Supp. 1354 (E.D. Va. 1974), *rev'd*, 530 F.2d 548 (4th Cir. 1975), *aff'd*, 430 U.S. 243 (1977). Some courts have stated that the duty to arbitrate, being contractual, could not survive expiration of the contract. That analysis necessarily rejects extension of the arguably vesting rights as well. The analysis that concludes the district court's opinion in *Nolde* is an example. 382 F. Supp. at 1354. Some courts have denied arbitration of the dispute but acknowledged on the merits that the parties could intend certain arguably vesting rights to survive termination of the contract. *See, e.g.*, Local 58, United Rubber Workers v. Sun Prods., Corp., 521 F.2d 1286 (6th Cir. 1975); International Ass'n of Machinists, Local 2369 v. Oxco Brush Div. of Vistron, 517 F.2d 239 (6th Cir. 1975). Last, some courts have ruled that if the dispute sought to be arbitrated requires the interpretation of a collective-bargaining agreement containing a broad and inclusive arbitration clause, the strong presumption of arbitrability created by *Warrior &*

In the second case, *Piano & Musical Instrument Workers, Local 2549 v. W.W. Kimball Co.*,[38] the federal district court ordered arbitration of a seniority rights dispute. The court also held that the question of arbitrability was to be determined by the arbitrator. The court assumed in its decision that, although the parties had had two meetings about seniority rights before expiration of their collective-bargaining agreement, no arbitrable dispute over seniority rights arose until after the expiration of the agreement. It then stated that the parties, according to the terms of their collective-bargaining agreement, were obligated to arbitrate disputes concerning the application and interpretation of that agreement, whether they arose before or after expiration of the agreement.[39] The appellate court reversed the lower court's holding that the question of arbitrability was one for the arbitrator.[40] It then disagreed with the lower court's statement that the post-contract dispute was arbitrable, stating that since the dispute over seniority rights did not arise until after expiration of the collective-bargaining agreement, the dispute was not arbitrable.[41]

The Supreme Court reversed the appellate court in a per curiam decision,[42] citing *United Steelworkers v. American Manufacturing Co.*[43] and *Wiley*. It was not clear, however, whether the Supreme Court agreed with the district court's assumption that the dispute arose out of events occurring after the stated expiration date of the collective-bargaining agreement, or whether it was relying on some theory of a possible anticipatory breach on the part of the company with respect to the employees' future seniority rights, thus giving rise to a dispute over these rights before expiration of the agreement.[44] Because of this confusion, *Piano Workers* also failed to eliminate disparate resolutions of the post-contract arbitration problem in the lower courts; it was thus necessary for the Supreme Court to decide *Nolde*.

II. THE *Nolde* DECISION

A. *Facts*

In 1970, Nolde Brothers, Inc. and Bakery and Confectionery Workers Local 358 concluded a collective-bargaining agreement that was to remain

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Gulf Navigation applies. *E.g.*, Local 358, Bakery & Confectionery Workers Union v. Nolde Bros., 530 F.2d 438 (4th Cir. 1975), *aff'd*, 430 U.S. 243 (1977); Local 595, Int'l Ass'n of Machinists v. Howe Sound Co., 350 F.2d 508 (3d Cir. 1965).

38. 221 F. Supp. 461 (N.D. Ill. 1963), *rev'd*, 333 F.2d 761 (7th Cir.), *rev'd*, 379 U.S. 357 (1964).

39. 221 F. Supp. at 464.

40. 333 F.2d at 765.

41. *Id.*

42. Piano & Musical Instrument Workers, Local 2549 v. W.W. Kimball Co., 379 U.S. 357 (1964).

43. 363 U.S. 564 (1960).

44. In *Nolde*, however, the Court clarified its decision in *Piano Workers*. In a footnote, the Court stated that "the dispute [in *Piano Workers*] did not arise . . . during the life of the agreement." Thus, *Piano Workers* was cited by the Court as precedent in *Nolde*. 430 U.S. 243, 252 n.7 (1977).

in effect from July 28, 1970 to July 21, 1973, and indefinitely thereafter, with each party having the power to terminate the agreement on seven days' notice after July 21, 1973. The agreement contained a broad and inclusive arbitration clause providing that either party could demand arbitration of any grievance not satisfactorily adjusted by a stipulated grievance procedure, with "[t]he decision or award of the Arbitration Board . . . final and binding on both parties."[45] The agreement also provided for vacation pay and severance pay geared to the length of service of an employee.

In May 1973 the parties began negotiating a new agreement. On August 20, 1973, after the date triggering the right to terminate (July 21, 1973) had passed, the union gave its notice of termination. Seven days later, on August 27, 1973, the union's termination of the contract became effective, although the workers continued working. Negotiations continued until August 31 when Nolde, threatened with a strike, closed the plant permanently. Nolde paid the workers their accrued wages and vacation pay but refused to make any severance payments or to arbitrate the severance pay issue, stating that the company's duty to pay severance pay and to arbitrate expired with the expiration of the collective-bargaining agreement. The union, however, claimed that its members had acquired rights to severance pay over the years under the terms of the collective-bargaining agreement. The union also maintained that these rights were irrevocable once they had accrued, and were therefore enforceable any time a member was severed from his job. That is, the union was claiming that the rights to severance pay were in the nature of vested rights. Under this interpretation, the only effect that expiration of the contract would have on severance pay would be that the employees could not acquire any additional severance pay rights after the expiration. The employer argued in opposition to this that the expiration of the contract meant that it could not be relied upon as the source of any severance pay rights, whether new or old, after the expiration date.

The union sought in federal district court to compel arbitration of the severance pay dispute. The district court decided that no rights to severance pay could survive termination of the collective-bargaining agreement, and that consequently, no issue remained to be arbitrated.[46] In the appellate court, the majority ruled that the district court had erred in deciding the merits before it decided the question of arbitrability. It then held, citing the *Steelworkers Trilogy*, that because the dispute over severance pay concerned an interpretation of the parties' intent in the old collective-bargaining agreement, it should be given to the arbitrator for resolution.[47]

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45. *Id.* at 245.

46. Local 358, Baker & Confectionery Workers Union v. Nolde Bros., 382 F. Supp. 1354, 1358-59 (E.D. Va. 1974), *rev'd*, 530 F.2d 548 (4th Cir. 1975), *aff'd*, 430 U.S. 243 (1977).

47. Local 358, Bakery & Confectionery Workers Union v. Nolde Bros., 530 F.2d 548, 552-53 (4th

B. *Holding and Analysis*

The United States Supreme Court held that Nolde Brothers, Inc. should be required to arbitrate the post-contract severance pay dispute, maintaining that the duty to arbitrate arose from the contract. To demonstrate this, the Court first pointed out the plausibility of the union's position that the parties had intended to arbitrate post-contract disputes. The Court then construed the contract in *Nolde* as in fact requiring the arbitration of post-contract disputes.

1. *The Plausibility of Post-Contract Arbitration*

The Court first emphasized the possibility that the parties could intend the severance pay rights in dispute to extend until after the stated expiration date of the agreement: "There is . . . no reason why parties could not if they so chose agree to the accrual of rights during the term of an agreement and their realization after the agreement had expired."[48] The Court then pointed out that the duty to arbitrate disputes over the meaning of collective-bargaining agreements, when the dispute arises or the arbitration is begun before the stated expiration date of the agreement, is not automatically extinguished when the stated expiration date arrives.[49] Through these examples, the Court demonstrated that the word "expiration" need not have the effect of automatically cutting off all rights or duties created by a contract, but rather, that the contract's meaning is shaped by what the parties intend it to mean.

The situation in *Nolde*, however, differed from the one posited by the Court. In *Nolde*, neither the arbitration nor the dispute arose until after the expiration of the collective-bargaining agreement. The Court therefore sought to explain why the duty to arbitrate should extend to the post-contract disputes at issue in *Nolde*.

2. *Finding an Agreement to Arbitrate Post-Contract Disputes in* Nolde

The Court enumerated five reasons for construing the contract to require arbitration of post-contract disputes, each of which is subject to criticism.[50] First, it emphasized that the parties did not expressly exclude the arbitration of such disputes.[51] It should be noted, however, that a

Cir. 1975), *aff'd*, 430 U.S. 243 (1977). The *Steelworkers Trilogy* consists of three cases involving arbitration of disputes, one of which is United Steelworkers v. Warrior & Gulf Navigation Co., in which the Court formulated the strong presumption of arbitrability. The other cases are United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960) and United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

48. 430 U.S. at 249 (quoting John Wiley & Sons v. Livingston, 376 U.S. 543, 555 (1964)).

49. *Id.*

50. For a good critique of the Court's interpretation of the agreement to arbitrate, see Goetz, *Arbitration After Termination of a Collective Bargaining Agreement*, 63 VA. L. REV. 693, 699-709 (1977).

51. 430 U.S. at 252-53.

determination that the arbitration of post-contract disputes was not expressly excluded by the parties does not necessitate a finding that such disputes are subject to arbitration.

A second reason the Court gave for interpreting the parties' contract as evidencing an intent to arbitrate the dispute in question was that they had "drafted their broad arbitration clause against a backdrop of well-established federal labor policy favoring arbitration. . . ."[52] To infer that the parties intended post-contract disputes to be arbitrable because they could expect the courts to apply this federal labor policy to such disputes, however, imputes to the parties an anticipation of the Court's decision in *Nolde*.

Third, the Court pointed out that the contract on its face seemed to require arbitration of the dispute in question: "The parties agreed to resolve *all* disputes by resort to the mandatory grievance-arbitration machinery. . . ."[53] The Court apparently ignored, however, that normally when a contract expires on a certain date, all rights and duties under that agreement, or at least the type of rights that do not ordinarily vest or ripen during the life of a contract, expire as well. The right to compel arbitration is not the type of right, like the right to unpaid wages under a three-week employment contract, for example, that parties normally intend to accrue and vest during the life of a contract and that survives the stated expiration date of a contract. It is defensible, however, to assert that the right to press a claim in the arbitral forum attaches to a dispute that is arguably governed by the collective-bargaining agreement just as the right to press a claim in the federal courts attaches to a dispute that is arguably governed by federal law.[54] This reasoning should have been more clearly enunciated by the Court.

The Court also pointed out that the company's interpretation of the contract "would permit the employer to cut off all arbitration of severance-pay claims by terminating an existing contract simultaneously with closing business operations."[55] This statement by the Court necessarily implies that the parties could never have intended such a result. To the contrary, the employer might well have intended such a result, and the employer's meaning might be the more justifiable interpretation of the contract.[56] A very plausible interpretation of the contract is that the parties simply intended severance pay claims arising out of the severance of one or two workers to be arbitrable if they occurred during the life of the contract because of the normal variations of the business cycle. This would not mean that the parties had any intent about what should be arbitrable in the event that an entire plant was closed after expiration of the contract.

52. *Id.* at 254.
53. *Id.* at 252 (emphasis in original).
54. *See* note 29 *supra*.
55. 430 U.S. at 253.
56. *See* Goetz, *supra* note 50, at 703-04.

Alternatively, the employer could have intended, by choosing the language in question, to avoid severance payments and arbitration of disputes over them.

As a fifth reason for its decision, the Court indicated why the parties would have chosen to arbitrate disputes over the application of the collective-bargaining agreement. Here the Court incorporated into its opinion the reasoning behind its formulation of the strong presumption in favor of arbitrability in *Warrior & Gulf.* The Court in *Nolde* began by enumerating the usual reasons for parties agreeing to arbitrate their disputes. First it cited the arbitrator's special expertise for filling in the gaps in collective-bargaining agreements, attributable to his knowledge of the "common law of the shop,"[57] and that "the alternative remedy of a lawsuit is the very remedy the arbitration clause was designed to avoid."[58] Then the Court noted that "[w]hile the termination of the collective-bargaining agreement works an obvious change in the relationship between employer and union, it would have little impact on many of the considerations behind their decision to resolve their contractual differences through arbitration."[59] It must be emphasized, however, that the advantages of arbitration over courtroom litigation, although presumably applicable to the present case, did not prevent Nolde, Inc. from willingly entering protracted litigation and foregoing those benefits.

The *Nolde* opinion did not make clear whether the Court reached its result because it discerned the parties' actual intent, or whether it reached its result because it thought that the reasons it cited would have caused the parties to have that intent had they thought about that problem at the time of contract formation. It is unlikely that the parties thought about the problem of post-contract arbitration at the time they formulated their contract. Therefore, it is unlikely that the Court could have based its decision on their actual intent. It is, however, quite possible, in light of all the facts cited by the Court, that the parties in *Nolde* would have included such disputes as arbitrable had they thought about them, thus making the union's interpretation of the contract—the one adopted by the Court—the most justifiable.

III. UNENUNCIATED REASONS FOR THE COURT'S DECISION

That the Court in *Nolde* construed the parties' contract to include post-contract disputes as arbitrable is not the most significant part of the decision. More significant is the rule or method of contract interpretation that the *Nolde* Court laid down for the lower courts. The Court itself inquired about and enumerated reasons why the parties to the agreement

57. 430 U.S. at 253.
58. *Id.* at 254.
59. *Id.*

would intend to arbitrate the post-contract dispute at issue.[60] Nevertheless, rather than establish a rule of contract interpretation that would allow the lower courts to interpret agreements to arbitrate by looking at all the evidence relevant to a determination of the parties' intent, the Court invoked the strong presumption of arbitrability that it had formulated in *Warrior & Gulf*.[61]

The Court in *Nolde* did not endeavor to explain or justify its "removal" of the lower courts' power to construe *Nolde*-type agreements. In order to explain the advisability of this removal, broader policy reasons than those discussed by the Court in its interpretation of the single contract in *Nolde* must be examined.

A. *The General Application of Reasons for Arbitration*

The five reasons that the Court cited for its construction of the parties' contract in *Nolde*—that the parties did not expressly exclude arbitration of post-contract disputes, that the contract was drafted against a backdrop of federal policy favoring arbitration, that the contract on its face seemed to require arbitration of the dispute, that the company's interpretation would allow it to cut off all post-contract claims by waiting to close the plant (or layoff workers) until an existing contract expired, and that the arbitrator would have special expertise and his services would be less expensive than litigation—would almost always apply to situations in which the meaning of a broad and inclusive arbitration clause is at issue.

This may have been one reason for the Court's extension of the presumption of arbitrability to post-contract disputes. Nonetheless, the existence of the Court's assumed reasons that parties choose to arbitrate may not be demonstrable by evidence in every instance, and perhaps should not simply be assumed to exist in the context of every post-contract dispute. Furthermore, even if these assumed reasons do apply to every post-contract dispute, a party may still be able to bring before the court other facts and evidence that override these considerations.

B. *Avoidance of Delay*

Another reason not discussed by the Court for its extension of the strong presumption rule of contract interpretation to post-contract disputes is a discernible reluctance on the part of the Court to delay resolution of industrial disputes by encouraging, or failing to discourage, litigation over the issue of arbitrability. The Court's failure to discuss this reason in *Nolde* is understandable, since the benefits of avoiding this delay would not apply to a *Nolde*-type situation, when the plant has been closed and the employment relationship terminated. It is, however, a strong

60. *Id.* at 252-55.
61. *Id.* at 254-55.

reason for extending the strong presumption for arbitration to post-contract disputes in the context of an ongoing employment relationship.

By extending the strong presumption in this context, the Court has enabled parties to collective-bargaining agreements to assess their rights and duties concerning arbitrability without asking for a judicial interpretation. Prolonged courtroom dispute about the proper forum for resolution of the workers' or employer's grievance could lead to loss of wages and production and generally sour the employer-employee relationship. Under *Nolde*, when a dispute does arise, the parties can quickly submit it to the arbitrator, obtain resolution, and get on with production, rather than risking the deleterious side effects and costs of a courtroom determination of their rights under the arbitration agreement. Without an expedited procedure, wildcat strikes or at least slowdowns could occur.

This consideration may not be reason enough for preventing the courts from inquiring into the parties' true intent in *Nolde*-type situations. But the approach taken by the Court in *Nolde* becomes considerably more compelling when the consequences of that approach are compared with the meager benefits the courts could expect from inquiring into the parties' intent. As was probably the case in *Nolde*, it is doubtful that the parties would have thought about the problem of post-contract arbitration when they formulated their contract.[62] In most cases, therefore, the long delay and high cost of a court proceeding would turn up no evidence of intent. Thus, the courts would be fostering industrial unrest by inviting delay in the resolution of industrial disputes, for the minimal reward of gaining little more than an educated guess about what the parties actually contemplated.[63]

C. *Leaving the Decision on the Merits to the Arbitrator*

Perhaps the main virtue of the *Nolde* decision is that it furthers the policy of preventing the courts from deciding the merits of collective-bargaining disputes "through the back door of . . . the arbitration

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62. Goetz, *supra* note 50, at 704.

63. *Cf.* Jones, *The Name of the Game is Decision—Some Reflections on "Arbitrability" and "Authority" in Labor Arbitration*, 46 TEXAS L. REV. 865, 869 (1968):

> The fundamental reason for requiring courts to abstain from interposing to oust arbitration except in the clearest of cases is the paramount necessity to avoid external tampering with the machinery of industrial self-government lest the will to govern, which is to say, bargain, be enervated. Vital to the operation of that machinery is the need for rapid resolution of labor disputes by an individual to whose judgment the parties have chosen to submit, thereby avoiding enmeshing in litigation—and exacerbating—what typically are highly charged, often personally colored issues.

Although Jones is concerned with courts ousting the arbitrator and the consequent disruption of industrial self-government, the same concerns apply to prolonged litigation over the question of arbitrability.

clause."[64] The Court did not enunciate this as a reason for its decision in *Nolde*. It is probable, however, that this consideration entered into the Court's extension of the strong presumption for arbitrability to post-contract disputes,[65] since this consideration heavily influenced its decision in *Warrior & Gulf*, in which the strong presumption was first formulated by the Court.[66] The problem of back-door merits decisions arose before the application of the strong presumption because of the peculiar way that broad and inclusive arbitration clauses link the right to compel arbitration of a dispute to the arguable validity of the right asserted in the dispute. The ramifications of this type of adjudication can best be demonstrated by examining a hypothetical situation factually similar to the *Nolde* case. Assume an agreement between Plower and Storeowner, under which Plower agrees to clear the snow from Storeowner's parking lot every time there is a "measurable snow" between November 1, 1978 and March 1, 1979. Assume that Plower and Storeowner have agreed to arbitrate any dispute over the meaning of their contract. A dispute over whether enough snow had fallen to justify clearing, for example, would clearly be arbitrable according to the terms of the agreement.

To bring the facts of the hypothetical closer to *Nolde*, let us further assume that Plower and Storeowner each agreed to contribute to an insurance policy covering damage to Plower's snow plow. This policy is not limited to damages occurring during Plower's activities on Storeowner's lot, but rather covers all damages to the plow. Let us further assume that Plower intends to put the snow plow in storage and let the policy lapse on April 30, 1979. After March 1, 1979, Plower seeks to compel Storeowner to pay Storeowner's share of the premiums on the insurance policy, claiming that Storeowner agreed to pay half of the premiums for the months of March and April. Storeowner refuses. May a court compel Storeowner to arbitrate this dispute? It is probable that many courts would conclude that there is no arguable dispute and therefore no resultant duty to arbitrate. In effect, the court would be deciding the merits of the dispute if it decided, on the basis of insufficient plausibility of the contract claim, to deny arbitration.

Allowing the courts broad powers to deny arbitrability because the claim asserted is not sufficiently plausible may be a good policy for interpreting commercial agreements like the one between Storeowner and Plower. These parties can make their agreements as explicit as they wish. The collective-bargaining agreement, however, is a sketchy agreement designed to be comprehensible to the union members who must vote on it. The parties customarily rely on an arbitrator to fill in the gaps. In this context, permitting the courts to delve into the merits through

64. United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 584-85 (1960).

65. *See* Goetz, *supra* note 50, at 707-08.

66. 363 U.S. at 583-85.

interpretation of the arbitration clause could cut off many valid claims before they reach the arbitrator.[67] It is just this result that the Court's strong presumption in favor of arbitrability was designed to prevent.

The Court in *Warrior & Gulf*, and again in *Nolde*, has decided that in light of the skeletal nature of collective bargaining agreements, it is better to err in favor of arbitrability to ensure that the courts do not cut off any valid claims. To this end the Supreme Court has extended the presumption of arbitrability to post-contract disputes, requiring the courts to find in favor of arbitrability unless arbitration of the particular dispute is negated expressly or by clear implication.

IV. ISSUES RAISED BY *Nolde*

A. *Extension of the No-Strike Duty to the Post-Contract Period*

An issue raised by the *Nolde* decision and commented upon by the dissent is whether the duty not to strike over post-contract disputes survives the stated expiration date of the contract. If it does not, then the Court's decision would have the effect of requiring the employer to arbitrate a dispute over which the union could still strike. For that reason the dissent accused the majority of dispensing with the *quid pro quo* relationship between the duty to arbitrate and the duty not to strike. The dissent in *Nolde* indicated that it considered "the Union's termination of the contract [as] releasing it from its obligation not to strike, foreclos[ing] any reason for implying a continuing duty on the part of the employer to arbitrate. . . ."[68] A close reading of the case law, however, and the pattern it represents, indicates that the *quid pro quo* relationship between arbitration and the prohibition of strikes will probably be preserved, with the union's duty not to strike attaching to any dispute that the court has determined the employer has a duty to arbitrate. In 1970, in *Boys Markets, Inc. v. Retail Clerks Union, Local 770*,[69] the Supreme Court held that a federal district court could enjoin a strike if the strike was "over a grievance which both parties [were] contractually bound to arbitrate" and the court bound the employer "to arbitrate, as a condition of his obtaining an injunction against the strike."[70] In 1971, in *Kauai Electric Co. v. IBEW*

67. Because the district court in *Nolde* summarily dismissed the union's claim to severance pay for its members, it is probable that the court, had it first decided the question of arbitrability, would have found that the severance pay dispute had not arguably arisen under the collective-bargaining agreement and was therefore not arbitrable. The numerous cases indicating that parties to an agreement could intend severance pay rights to survive expiration of a contract, however, provide evidence that the claim is at least arguable. *See, e.g.*, John Wiley & Sons v. Livingston, 376 U.S. 543, 555 (1964) ("We see no reason why parties could not if they so chose to agree to the accrual of rights during the term of an agreement and their realization after the agreement had expired."); Local 58, United Rubber Workers v. Sun Prods., Corp., 521 F.2d 1286 (6th Cir. 1975); International Ass'n of Machinists v. Howe Sound Co., 350 F.2d 508 (3d Cir. 1965); Sargent-Welch Scientific Co., 208 N.L.R.B. 125 (1974).

68. 430 U.S. at 257 (Stewart, J., dissenting).

69. 398 U.S. 235 (1970).

70. *Id.* at 254.

Local 1260[71] a United States District Court held that it had the power to enjoin a strike over a dispute arising out of events occurring during the period of the collective-bargaining agreement, even though arbitration and the strike were not begun until after the stated expiration date of the agreement. The court stated that it did not view the existence of a current collective-bargaining agreement as a prerequisite to enjoining the strike. It required only "that the strike sought to be enjoined [be] 'over a grievance which both parties are contractually bound to arbitrate,' "[72] citing *Boys Markets.*

Thus, in *Kauai* the duty not to strike accompanied the duty to arbitrate into the period after the stated expiration date of the collective-bargaining agreement. If one is willing to accept the *Kauai* decision, it is arguable that the no-strike duty will also accompany the arbitration duty in *Nolde*-type situations, in which the events giving rise to the dispute occur after the stated expiration date of the contract. *Kauai* suggests that the existence of the no-strike duty is governed by the existence of a duty to arbitrate and not by the term of the collective-bargaining agreement.[73]

Even stronger support for extending the no-strike duty along with the arbitration duty is found in the Supreme Court's decision in *Gateway Coal Co. v. United Mine Workers.*[74] In *Gateway* the Court upheld a district court decision enjoining a strike over a safety measure dispute that the union claimed was not subject to the arbitration clause of the collective-bargaining agreement. The Court held that the strong presumption of arbitrability of *Warrior & Gulf* applied[75] and that the dispute was therefore arbitrable. The Court cited *Boys Markets* in holding that the district court had the power to enjoin the strike, stating that "[a]bsent an explicit expression of . . . an intention [that the duty to arbitrate not be accompanied by a duty not to strike], the agreement to arbitrate and the duty not to strike should be construed as having coterminous application."[76] Having found that the dispute was arbitrable, the Court then created a strong presumption of a no-strike duty that parallels the strong presumption of the duty to arbitrate. It is unlikely that the courts will depart from this line of reasoning in *Nolde*-type situations and deny injunctions of strikes over post-contract disputes that have been deemed arbitrable.

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71. 79 L.R.R.M. 2838 (D. Haw. 1971).

72. *Id.* at 2843.

73. *See* Goya Foods, Inc., 238 N.L.R.B. No. 204, 99 L.R.R.M. 1282, 1284 (1978). In *Goya* the National Labor Relations Board enjoined a strike begun after expiration of the collective-bargaining agreement over grievances arising out of the discharge of certain employees during the term of the agreement. Although the dispute in *Goya*, unlike *Nolde*, began during the life of the agreement, the Board cited *Nolde*, stating: "The agreement 'lives' on in the duty to arbitrate; so should the duty not to strike live on to the extent of the duty to arbitrate over issues created by or arising out of the expired agreement."

74. 414 U.S. 368 (1973).

75. *Id.* at 377-79.

76. *Id.* at 382.

It should be recognized that the courts' power to enjoin strikes over post-contract disputes is of no significance in *Nolde*-type situations, in which the plant has closed and there is no longer any possibility of a strike. It is, however, a significant consideration in extending the duty to arbitrate to post-contract disputes when the employment relationship has not been terminated. If the lower courts have the power to enjoin strikes over post-contract disputes that have been declared arbitrable, both parties will be precluded from resorting to the economic forum for a resolution of their differences. This is best demonstrated by considering a situation in which there is a gap between the expiration date of an old collective-bargaining agreement and the effective date of a new one, each of which contain broad and inclusive arbitration clauses. Suppose that after the formulation of the new agreement, a dispute arises out of the severance of a number of employees during the hiatus between the stated expiration date of the old agreement and the effective date of the new one. If this dispute is not declared arbitrable by the courts because it concerns interpretation of the old agreement, there will be nothing to trigger the union's duty not to strike over that dispute. The Court's decisions in *Boys Markets, Inc. v. Retail Clerks Union, Local 770*[77] and *Buffalo Forge Co. v. United Steelworkers*[78] point to this result. In *Boys Markets* the Court ruled that a strike could be enjoined only if the employer was under a duty to arbitrate and agreed to submit the dispute to arbitration as a precondition to the injunction. In *Buffalo Forge*, the Court refused to enjoin a sympathy strike in the face of an express no-strike clause, because "[t]he strike had neither the purpose nor the effect of denying or evading an obligation to arbitrate or of depriving the employer of its bargain" since it was not a strike over a disagreement between the union and the employer about the collective-bargaining agreement.[79]

Therefore, an employer who had signed an agreement containing inclusive arbitration and no-strike clauses could find himself nonetheless subject to a strike because of a dispute over the old collective-bargaining agreement. Although the employer could also be subjected to nonenjoinable strikes if the parties expressly excluded such disputes from arbitration, an unclear contract should certainly be construed to avoid this result.

B. *Enjoining Strikes Over Fabricated Disputes*

A problem raised by the possible extension to the post-contract period of the courts' ability to enjoin strikes is the danger of strikes ostensibly concerning disputes not covered by the duty to arbitrate but actually concerning the particular dispute subject to arbitration. Assume,

77. 398 U.S. 235 (1970).
78. 428 U.S. 397 (1976).
79. *Id.* at 408.

for example, that there is a dispute over the severance pay rights created by an expired collective-bargaining agreement and that no new collective-bargaining agreement has been entered into by the union and the employer. A strike to protest the disciplining of an employee that occurred after expiration of the old agreement, or to extract concessions from the employer in the negotiations of a new agreement, would not be enjoinable because these disputes would not be governed by any collective-bargaining agreement. Thus, the union could call a strike, insisting that it is over disciplinary measures, when in reality the strike is based upon the severance pay dispute.

The courts' power under *Boys Markets* to enjoin such strikes may lessen this problem. The Court in *Boys Markets* required that a court determine that a strike is over a dispute the employer is under a duty to arbitrate before an injunction may issue. To make such a determination, the court must necessarily possess the ability to look beyond the label given a strike to determine its true origin.

Furthermore, the problem of fabricated reasons for strikes may not be as great as it seems at first glance, since a strike is only effective if it can be used to extract concessions from the employer. If the union strikes over a grievance ostensibly not subject to arbitration, actually intending to force the employer to settle an arbitrable dispute in the union's favor, it is difficult to imagine how the union could make known to the employer the price for ending the strike without belying the strike's true nature.[80]

C. *The Limited Value to Employers of the* Quid Pro Quo *Relationship*

Preservation of the *quid pro quo* relationship between the arbitration duty and the no-strike duty on a dispute-by-dispute basis is of little comfort to an employer forced to arbitrate with the union over one dispute and faced with a nonenjoinable strike over another. The alternative, however, seems to be to prevent the union from striking over any disputes that it has with the employer if a duty exists to arbitrate even a single dispute. Under such a rule, the courts would be forced to enjoin strikes over disputes that no one had a duty to arbitrate. This would clearly conflict with the anti-injunction provisions of the Norris-LaGuardia Act as construed by the Supreme Court in *Boys Markets*, which required as a prerequisite to an injunction that the employer be under a duty and agree to arbitrate the dispute about which the union was striking.[81] The Court's

80. *See* Goya Foods, Inc., 238 N.L.R.B. No. 204, 99 L.R.R.M. 1282 (1978). In *Goya* the union struck after the expiration of the collective-bargaining agreement. Shortly after the strike began, the union added a new contract and recognition of a new bargaining agent as conditions for ending the strike. The union argued that, although reinstatement was an arbitrable issue, the dispute over a new contract and recognition of a new bargaining agent were not subject to arbitration and therefore the strike was not enjoinable. The NLRB held that as long as one of the union's conditions for ending the strike was the subject of an arbitrable dispute, the whole strike was "tainted" and therefore enjoinable.

81. 398 U.S. at 254. For a brief discussion of the Norris-LaGuardia Act, see text accompanying note 18 *supra*.

decision in *Nolde*, extending the duty to arbitrate into the post-contract period, increases the likelihood of coexisting arbitrable and nonarbitrable disputes, which gives rise to this dilemma. The Courts should have at least considered this problem before it extended the strong presumption of arbitrability to post-contract disputes.

D. *The Court's Departure From the "Substitution for Industrial Strife" Rationale of Arbitration*

Both the strong presumption of arbitrability in *Warrior & Gulf*[82] and the *quid pro quo* relationship between the arbitration duty and the no-strike duty[83] were based in large part on the rationale that arbitration is a substitute for industrial strife. In *Boys Markets*, the Supreme Court stated that "the very purpose of arbitration is to provide a mechanism for the expeditious settlement of industrial disputes without resort to strikes, lockouts or other self-help measures."[84] It also suggested that "[a]ny incentive for employers to enter into [agreements to arbitrate] is necessarily dissipated" if the no-strike obligation cannot be enforced by an injunction.[85] Furthermore, when formulating the strong presumption for arbitrability in *United Steelworkers v. Warrior & Gulf Navigation Co.*, the Court emphasized that, while "in the commercial case, arbitration is the substitute for litigation," in the industrial relations case "arbitration is the substitute for industrial strife."[86] When a plant is closed, however, as in *Nolde*, industrial strife is no longer possible. Thus, the Court departed from its emphasis on strike avoidance as a reason for arbitration. The Court instead emphasized in *Nolde* that "[b]y their contract the parties clearly expressed a preference for an arbitral rather than a judicial interpretation of their obligations" and that "the alternative remedy of the lawsuit [was] the very remedy the arbitration clause was designed to avoid."[87] The Court reasoned that the parties' interest in avoiding litigation and having an expert arbitrator interpret their agreement would apply to a closed-plant situation as well as to an ongoing employer-employee relationship. Therefore, the Court felt free to dispense with the *quid pro quo* relationship by requiring arbitration in the closed-plant context. Although the dissent criticized the majority for dispensing with the *quid pro quo* relationship between the arbitration and no-strike duties,[88] it is not at all a foregone conclusion that such a relationship must necessarily exist. It is quite possible that the parties in *Nolde* concluded

82. *See* text accompanying note 31 *supra*.
83. *See* text accompanying note 10 *supra*.
84. 398 U.S. 235, 249 (1970).
85. *Id.* at 248.
86. 363 U.S. 574, 578 (1960).
87. 430 U.S. at 253-54.
88. *Id.* at 256-57 (Stewart, J., dissenting).

their collective-bargaining agreement with the assumption in mind that an arbitrator would interpret it, even in the absence of a *quid pro quo* relationship.

It is unfortunate, however, that the Court extended the *strong* presumption of arbitrability to the closed-plant context. The strong presumption effectively removes the lower courts' power to interpret arbitration clauses in collective-bargaining agreements. The consequent discouragement of litigation over the meaning of arbitration is desirable in the context of continuing operations when delays in resolution of difficulties can cause loss of production or other industrial problems. When the employment relationship has terminated, however, there will be no industrial strife to avert by not taking the time to discern the parties' intent concerning arbitration.[89]

Thus, the crucial question becomes whether the parties' interest in avoiding litigation and the judicial policy of preventing courts from deciding the merits of a dispute through the "back door" of the arbitration clause in themselves justify a removal of the lower courts' power to interpret arbitration agreements. It is doubtful that they do. The Supreme Court, in *Warrior & Gulf*, distinguished industrial arbitration—the substitute for industrial conflict—from commercial arbitration—the substitute for litigation—when it articulated the strong presumption of arbitrability.[90] Thus, the Court itself apparently did not deem mere avoidance of litigation a sufficient reason for applying a strong presumption of arbitrability.

Furthermore, there is little reason to assume that the lower courts will fail to recognize the parties' interest in avoiding litigation and the danger of deciding the merits of a dispute through the "back door" of the arbitration clause.[91] Thus, it would seem that the formulation of a weak presumption of arbitrability, instructing the lower courts to order arbitration of a dispute unless the employer proves with clear and convincing evidence that his interpretation of the arbitration agreement is the more justifiable, would amply support the policy in favor of arbitration.

E. *Limiting the Duration of the Duty to Arbitrate*

One problem that the Court declined to consider in *Nolde* was the point at which the duty to arbitrate post-contract disputes ceases.[92] The Court implicitly recognized that the duty to arbitrate could not extend forever, commenting that it "need not speculate as to the arbitrability of post-termination contractual claims which, unlike the one presently before us, are not asserted within a reasonable time after the contract's

89. *See* Goetz, *supra* note 50, at 706-07.

90. 363 U.S. 574, 578 (1960). The Court's language is quoted in the text accompanying note 86 *supra*.

91. *See* Goetz, *supra* note 50, at 706-07.

92. 430 U.S. at 255.

expiration."[93] Ascertaining what constitutes a reasonable time will prove to be a difficult, if not an impossible task. Furthermore, confusion generated by this question would invite litigation over the interpretation of "reasonable time." This undercuts the main advantage of the strong presumption of arbitrability—avoiding courtroom delay and the industrial unrest that it might cause. Requiring the employer to arbitrate the validity of any claim made by the union while the union is still the employees' representative would be a better solution to this problem. As long as the union is still the employees' representative, there is little reason to require the parties to settle their disputes in the courts rather than before an arbitrator.[94] If the employer does not want to arbitrate these disputes, he can insist on the union entering into a collective-bargaining agreement barring arbitration of post-contract disputes. The agreement could further provide that any disputes over rights accrued or vesting under old agreements also be resolved in the courts.

F. *Guidance for the Lower Courts*

Finally, the Supreme Court should have set guidelines declaring which rights could arguably vest during the life of an agreement and thus be subject to arbitration after its expiration. Such rights might include seniority rights, vacation pay rights, or severance pay rights. Without such guidelines, unions may phrase certain claims, such as disciplinary claims occurring during the hiatus between two collective-bargaining agreements, in a manner that suggests that they arguably arose under the old agreement, simply for the purpose of gaining arbitration of the dispute. A literal reading of the Supreme Court's language in *Wiley* and *Nolde* suggests that such disputes would be arbitrable in the absence of a clearly implied or express exclusion. But such a literal reading by the lower courts might yield an unfortunate result. Fear that they may be required to arbitrate any cleverly phrased claim, regardless of the possible nonvesting nature of the right claimed, may cause employers to insist on the exclusionary clause suggested by the Court in *Nolde*.[95] If that is the case, the Court will find that its decision discourages rather than encourages arbitration of disputes.

V. CONCLUSION

In *Nolde* the Supreme Court extended the strong presumption of

93. *Id.* at 255 n.8.

94. *See* Moruzzi v. Dynamics Corp. of America, 443 F. Supp. 332 (S.D.N.Y. 1977). Dynamics Corporation closed its plant on December 1, 1970. Later in December, Local 478, the union representing the employees, ceased to exist. The company pension plan was low on funds and it was discovered that some employees would receive no pension at all. A special committee was formed by the workers to try to compel arbitration in the federal courts. The courts held that the committee was not the representative of the employees and therefore could not arbitrate the dispute. It suggested that the employees could press their claims in the courts as individuals.

95. 430 U.S. at 255.

arbitrability—a rule of contract interpretation—that it had enunciated in *Warrior & Gulf* to disputes arising out of events occurring after the stated expiration date of a collective-bargaining agreement. Lower courts must now order arbitration of these post-contract disputes unless they are expressly or by clear implication excluded from arbitration by the parties' agreement. This is a good result, although the Court failed to articulate the best reasons for it.

The decision furthers a judicial policy of discouraging litigation over the question whether the arbitrator or the courts should decide a dispute. The primary benefit of that policy is that it prevents the courts from cutting off arbitration of potentially valid claims that are not readily evident to the courts because of the sketchy character of collective-bargaining agreements. Finally, the decision restrains the lower courts from inquiring, perhaps fruitlessly, into the parties' intent in every instance, and thus avoids delays in the resolution of disputes and possible resulting industrial unrest.

The decision in *Nolde* is not without problems, however. It raises the question whether the Court has dispensed with the *quid pro quo* relationship between the no-strike duty and the duty to arbitrate. Although the Court probably has not abolished the relationship in the context of continuing plant operations, the duty not to strike over certain arbitrable disputes after expiration of a collective-bargaining agreement will be of little worth to the employer if that duty is swallowed up by strikes over nonarbitrable disputes. In the context of arbitration after a plant-closing, the Court has moved away from the *quid pro quo* relationship.

Of greater significance is the Court's departure from its statement that arbitration is a substitute for the industrial resolution of disputes, emphasizing instead in *Nolde* that arbitration is a substitute for litigation. Finally, the Court should have limited more clearly the duty to arbitrate to arguably vesting rights like severance pay, vacation pay, and seniority pay, even though such a limitation is in itself a decision on the merits. By speaking too broadly in *Nolde*, the Court may unwittingly have provoked employers to insist that collective-bargaining agreements exclude arbitration of all post-contract disputes, to the ultimate detriment of the national policy favoring arbitration.

David L. Feldwisch